(1)

Supreme Court, U.S.
FILED

JUN 30 2003

No. 03-26

IN THE

Supreme Court of the United States

JAMES J. RODWELL,

Petitioner,

v.

PETER A. PEPE, JR., ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Fed. R. Civ. P. 60(b) permits the court to

> relieve a party . . . from a final judgment . . . (1) [for] mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the Judgment.

The circuit courts have adopted three basic, distinct approaches as to whether this rule permits resurrection of a previously dismissed habeas petition. Some courts have held Rule 60(b) to be unavailable to previous habeas petitioners, while the Second Circuit has held that a Rule 60(b) motion is not properly viewed as a second or subsequent habeas petition. The First Circuit held in this petitioner's case that it was adopting an approach to Rule 60(b) in which the factual predicate of such a motion is determinative of whether it should be treated as a second and subsequent habeas petition.

The question presented is whether a motion, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to vacate a judgment denying habeas relief, should be considered a second or successive petition presented to the Court pursuant to Title 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

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The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The petitioner's convictions, and the denial of a 1983 motion for new trial, were affirmed in *Commonwealth v. Rodwell*, 394 Mass. 694, 477 N.E.2d 385 (1985). A second motion for new trial was denied in 1986 by the trial judge, and the denial of the petitioner's habeas corpus petition was affirmed in an unpublished opinion in 1987. *Rodwell v. Fair*, No. 86-2455, slip op. (D. Mass. April 13, 1987), *aff'd*, *Rodwell v. Fair*, 834 F.2d 240 (1st Cir. 1987) (per curiam).

The petitioner subsequently sought relief by means of motions for new trial in the state court, all of which were denied without hearing, including a 1997 motion for new trial based upon newly discovered exculpatory evidence that had been suppressed by the prosecution. That motion was accompanied by affidavits which included the sworn statement of a Suffolk County prosecutor that the chief investigator in the petitioner's Middlesex County case had appeared without notice to him in the Suffolk County Superior Court and undercut his sentencing recommendation in criminal proceedings (in Suffolk County) against the inmate who testified to the petitioner's supposed "jailhouse confession" in this (Middlesex County) case.

Following the denial of relief sought in motions for new trial in the state court, the petitioner was ordered to seek, and then was denied, a Certificate of Appealability on August 28, 2001. The petitioner filed a Rule 60(b)(6) motion because the habeas action is civil in nature, and in due course sought an appeal with the First Circuit Court of Appeals. *See Greene v. Tennessee Dept. of Correction*, 265 F.3d 369, 371 (6th Cir.

2001); *Stringer v. Williams*, 161 F.3d 259 (5th Cir. 1998). He filed a claim of appeal on October 10, 2001. *See* 28 U.S.C. § 2244(b)(3).

Although a Rule 60(b)(6) motion sounds in civil appellate procedure, the court denied relief (per Young, C.J., 183 F. Supp. 2d 129), assuming that a post-judgment motion under that Rule would comprise a second or successive petition, subject to the AEDPA's restrictions. *Cf. Thompson v. Calderon* (9th Cir. 1998) (en banc), and cases cited. In the interim, the petitioner therefore filed a motion for leave to file a second and subsequent petition for a writ of habeas corpus, a request that was denied by the First Circuit. *Rodwell v. Pepe* (No. 99-2109), 183 F. Supp. 2d 129 (1st Cir. 1999).

The court of appeals' opinion denying relief (No. 01-2411, per C.J. Selya, Stahl, and Lynch) affirming is published at 324 F.3d 66 (2003).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on April 1, 2002. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure, and of Title 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) are relevant to this petition. Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (codified as amended in 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000).

STATEMENT OF THE CASE

In November, 1981, the petitioner was tried in Middlesex County, in the Commonwealth of Massachusetts, for a 1978 shooting and was convicted of murder, armed robbery, and illegally carrying a firearm. He was sentenced to a mandatory term of life imprisonment for murder; a concurrent eighteen-to-twenty term for armed robbery; and three-to-five years for carrying a firearm.

There was no forensic evidence linking the petitioner to the charged offenses. The Commonwealth's case relied on two witnesses: an immunized witness who drove the victim to the murder scene and who drove away after the shooting, and an inmate who had the opportunity to confer with the immunized witness while both witnesses were incarcerated prior to trial and faced multiple life sentences, and who claimed the petitioner confessed to him after being implicated by the immunized witness (who was in federal custody in 1981, and was a former employee of the petitioner's).

In state court post-conviction proceedings, the petitioner has been denied even an evidentiary hearing, upon proffering a showing that, for example:

- State prosecutors failed to disclose that David Nagle, the chief "jailhouse informant" witness against the petitioner, was a long-standing paid informant whose tenure as an undercover agent with the DEA, as well as an informant for additional state and federal law enforcement sponsors, included 1981, the year in which he first implicated and then testified against the petitioner;

- State prosecutors never disclosed that the DEA used Nagle as an undercover agent while he served a

Massachusetts sentence, which would have supplied the factual showing that the Commonwealth's Supreme Judicial Court determined was missing when, in the petitioner's direct appeal, it refused to reach the issue of whether Nagle was a government agent with a stake in confabulating a jailhouse "confession" to curry favor with law enforcement authorities to whom he had been reporting (*See Commonwealth v. Rodwell*, 394 Mass. 694, 477 N.E.2d 385);

- Nagle's undisclosed tenure as a DEA operative included his testimony to an alleged "jailhouse confession" in an unrelated case;

- Nagle falsely testified that his sole concrete consideration for testifying against the petitioner was a transfer to a western Massachusetts jail, information which has been repeatedly and successfully invoked by the government as supposedly evidencing that the jury heard "sufficient" testimony concerning Nagle's "bias" notwithstanding its failure to disclose additional exculpatory evidence;

- Nagle falsely testified, in testimony relied upon by the Supreme Judicial Court in rejecting the petitioner's contention that Nagle was a government agent, that he had no contact with any law enforcement officer about this case until July 14, 1991, when in fact, an undisclosed *June 12, 1981* hearing before a Middlesex County Superior Court judge revealed that Middlesex County prosecutors were well aware of, and withheld from the defense, the fact that well before either Nagle or the Commonwealth's chief police investigator that Nagle first implicated the petitioner in this case,

Nagle had "given a great deal of information to the Suffolk D.A.'s office and actually to some Middlesex police as well, regarding other matters. *On the Suffolk cases they intend to transfer him to the western part of the State for safety purposes*";

- It was not until well more than a decade afterwards, subsequent to the petitioner's application for a writ of habeas corpus, that the existence of that proceeding involving Nagle and a Middlesex County prosecutor finally was unmasked by an investigative reporter;

- After Nagle spoke to the Commonwealth's chief investigator, and implicated the petitioner, his undisclosed rewards included a prompt reduction in bail, and assuredly did *not* include the one concrete benefit (that of a jail transfer) that the jurors were misled to believe stemmed from his cooperation in this particular case and county (*See Commonwealth v. Rodwell*, 394 Mass. at 696, 477 N.E.2d at 387);

- Nagle falsely testified that he first spoke to law enforcement officials about the killing at issue in the petitioner's case in July of 1981, approximately four weeks *after* an undisclosed bail hearing at which Nagle's own counsel had alluded to his prior and ongoing "cooperation" with Middlesex investigators and assured forthcoming guilty pleas *on the very charges as to which Middlesex County's chief investigator in the case, Lieutenant Spartichino, would be making a surprise appearance at Nagle's sentencing in unrelated cases in another county*, and despite Nagle's trial testimony that the Commonwealth's chief investigator made "no promises," but would merely speak on Nagle's behalf

and write a (never-produced) letter explaining Nagle's cooperation;[1]

---

1. Nagle's now demonstrably false claim not to have received any promises from the Commonwealth could not have been more specific, or central to the Commonwealth's contention that Nagle had nothing to gain from his testimony: the prosecutor questioned Nagle as follows (Trial Transcript, Volume IV, pp. 142-144 [emphasis supplied]):

> Q. Mr. Nagle, I'd like to ask you, sir, did you have a reason for talking to Lieutenant Spartichino [the Commonwealth's chief investigator in the petitioner's case]—
>
> A. Yes.
>
> Q. —and not doing what the defendant asked?
>
> A. I had a few reasons.
>
> Q. Would you tell this jury what your reasons were, sir?
>
> A. Well, I had enough problems of my own with what I have pending against me, and I wasn't about to get involved in perjury in a capital case. It could be a life sentence for perjury. And also, the lieutenant could speak on my behalf.
>
> Q. Now, with regard to the latter, speak on your behalf, would you indicate on what?
>
> A. On the cases I had pending against me.
>
> Q. *When you first met with Lt. Spartichino, before you actually told him anything, sir, was anything promised or offered to you in exchange for your testifying or talking*?
>
> A. *No, he was quite emphatic about that—no promises.* He said he would speak on my behalf, and write a letter.
>
> Q. Concerning what?
>
> A. Well, I have cases in Suffolk County and Middlesex.

(Cont'd)

- The contents of Nagle's bail hearing, impounded and never disclosed by the Middlesex District Attorney's Office to the defense in this case, coupled with the eventual disposition of those charges against Nagle, suggest an undisclosed and comprehensive plea agreement between the Middlesex District Attorney's Office and Nagle with respect to the multiple serious life felony charges then pending against Nagle in two counties;

- The Commonwealth's chief investigator falsely swore, in successfully opposing the petitioner's first motion for new trial, that in consideration for Nagle's testimony against the petitioner, the investigator merely "intended to notify the Middlesex and Suffolk County District Attorneys of Mr. Nagle's cooperation." In fact, withheld documents demonstrate that he had no need to do inform the Middlesex prosecutors, who were already well aware of Nagle's cooperation, and the lead investigator instead undercut a Suffolk County prosecutor by making a secret presentation to the sentencing judge at the bench, to the prosecutor's great surprise and consternation, when it came time to dispose of various serious Suffolk County cases against Nagle;

(Cont'd)

Q. And what did the lieutenant say he would do?

A. That he would speak on my behalf.

Q. *But did he promise you anything?*

A. No, no way.

Q. *Was anything said that you would get any particular outcome or disposition for any case?*

A. *None whatsoever.*

- Nagle's undisclosed Middlesex bail hearing reveals that Nagle was furnishing information to both Middlesex and Suffolk authorities *prior to June 12, 1981*, at which time he had pending against him the very same serious felony matters as to which Lieutenant Spartichino appeared successfully to undercut a Suffolk County prosecutor's sentencing recommendation after Nagle had testified against the petitioner in this case;

- Withheld information concerning the June 12, 1981 bail hearing disclosed not only that Nagle lied to the petitioner's jury about the nature of the consideration for his testimony against the petitioner, but also that his lie before the jury took the uniquely invidious form of suggesting that any inclination towards the Commonwealth in this case was motivated by gratitude for being safeguarded against some threat posed to him by this petitioner. In fact, Middlesex prosecutors were aware, and failed to reveal, that Nagle's transfer was in fact accomplished in order to safeguard him in relation to information he was furnishing in distinct cases in another county;

- The prosecutor elicited from Nagle the false testimony that he pleaded guilty to a larceny in July of 1976, and then was not arrested or convicted of any crime again until September 11, 1980. In fact, Nagle's probation records, never disclosed by the Commonwealth despite a specific pre-trial order that they be provided to the defense, reveal that he was charged and convicted of crimes on July 26, 1976, October 28, 1976, January of 1979 and May of 1980, and reveal at least *eight additional undisclosed pending armed robbery charges* against him when he began implicating the petitioner;

- Neither probation records, nor complete criminal records, nor a complete accounting of rewards or inducements to *either* Holmes or Nagle, ever was provided to the defense. For example, the jury heard about only twelve expurgated and self-serving versions of *fifty-one* criminal charges against Nagle. The petitioner's jury heard about a lone armed robbery charge against Nagle, and eight "larcenies" which the jurors were never told had been reduced from armed robberies; they did not hear anything of an additional *twenty-six* armed robbery charges;

- An undisclosed Suffolk County change of plea hearing on February 26, 1982 culminated an undisclosed assurance by Nagle's counsel, made *five months prior to the petitioner's trial,* as to Nagle's ongoing cooperation with Middlesex and Suffolk authorities and his forthcoming pleas on the multiple Suffolk County charges;

- At that February, 1982 plea hearing, Lieutenant Spartichino, *without even consulting the assistant district attorney in the pertinent case*, along with an *unidentified individual* whose identity has never been disclosed to the petitioner, approached the judge, who immediately undercut the prosecutor's fifteen-to-twenty year plea recommendation and instead sentenced Nagle to only seven-to-twelve years despite his lengthy and serious criminal record;

- Nagle could not possibly have heard any alleged confessions from the petitioner in the Billerica House of Correction, because Nagle testified he first met the petitioner there on May 22 or May 23, 1981, and that the allegedly inculpatory conversations did not occur until *seven to ten days thereafter*: the

petitioner had not yet arrived at Billerica then, and the day after the petitioner did arrive at Billerica pending trial, correctional officers launched a strike during which there was an institution-wide lock-up and no such conversations could have taken place;

- The Middlesex District Attorney's Office did not turn over to the defense photographs taken the night of their crime scene investigation which would have revealed conditions dramatically at odds with the immunized witness's testimony; and

- The Middlesex District Attorney's Office did not turn over to the defense police reports, including one of an interview of a witness who reported seeing someone else commit the murder for which the petitioner has been deprived of his liberty for more than two decades.

In the petitioner's direct appeal, the Commonwealth of Massachusetts' Supreme Judicial Court ruled that he had not made an adequate showing that the jailhouse informant against him was a government agent, and thus that supposed admissions to Nagle should have been excluded as violating the petitioner's Sixth Amendment right to the assistance of counsel. *See Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964). *See also e.g., United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183 (1980).

The Supreme Judicial Court ruled, however, that the petitioner at that time had "presented no significant facts in support of the claim that Nagle was a government agent," having alleged only "that Nagle had received the benefit of being transferred to Greenfield," a fact with "little, if any, relevance to the question whether Nagle was a government agent at the times he and the defendant spoke at Billerica." *Commonwealth v. Rodwell*, 394 Mass. at 698, 477 N.E. 2d at 388.

Of enormous relevance to the question of whether Nagle was a government agent when he supposedly spoke to the petitioner in early June of 1981, however, was information withheld by the prosecution, including Nagle's own counsel's undisclosed representation to a Middlesex Superior Court judge that, only a few days after Nagle claimed to have heard the "confession," Nagle had been furnishing information to both Middlesex and Suffolk County authorities.[2] *See Newell v. Hanks*, 283 F.3d 827, 831, 835-837 (7th Cir. 2002) (petitioner not procedurally barred barred by AEDPA from federal review of *Brady* argument concerning state's concealment of evidence of agreement with confidential informant). *See also e.g.*, *Crivens v. Roth*, 172 F.3d 991, 995 (7th Cir. 1999) ("We will not penalize [petitioners] for presenting an issue to us that [they] were unable to present . . . because of the state's misconduct.")

Thus, within scant days of the time in early June, 1981, when Nagle purported to hear a "jailhouse confession" from the petitioner, Nagle's attorney was in a Middlesex County courtroom, with a Middlesex County prosecutor, discussing Nagle's cooperation with authorities who specifically included Middlesex police, and alluding to an extant agreement by which Nagle would be pleading guilty in Suffolk County cases—the very same cases on which Nagle ended up with sentences to run concurrent with his extremely lenient Middlesex sentence, after the chief investigator in the instant case arrived, unannounced, unbidden, and

2. The Middlesex District Attorney's Office never disclosed that its officer was present in a Suffolk County courtroom on June 12, 1981, as Nagle's attorney outlined how helpful Nagel had been both to Middlesex and to Suffolk County authorities: prosecutors demonstrably were well aware of, and withheld from the defense, the fact that on June 12, 1981, well before both Nagle and chief investigator Spartichino swore that Nagle first implicated the petitioner in this case, Nagle had in fact "given a great deal of information to the Suffolk D.A.'s office and *actually to some Middlesex police as well*, regarding other matters."

unwelcome, at the Suffolk County sentencing and successfully undermined the Suffolk County prosecutor's recommendation.

All of this information was withheld by a prosecutor on explicit notice of the *Brady* and *Massiah* issues,[3] and whose witnesses provided pivotal accounts at trial, which proved to be directly at odds with withheld information. None of this critical information could have been discovered by the defense because the government violated its continuing duty to disclose that information.[4] *See, e.g., Newell v. Hanks, supra.*

"Where, as here, the Petitioner has made a pretrial request for specific exculpatory information, reversal is required if nondisclosure 'might have affected the outcome of the trial.'" *United States v. Devin*, 918 F.2d 280, 289 (1st Cir. 1990). In this instance, where the trial was based *solely* on the credibility to be accorded informant-witnesses, compliance with the government's discovery obligations not only would have affected the trial's outcome, but would have removed any plausible basis for reasonable triers of fact to have convicted the petitioner.[5]

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3. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

4. The Middlesex District Attorney's office was aware that Nagle had in fact been working for both Middlesex and Suffolk authorities *at the time he was offering to testify to the petitioner's supposed jailhouse confession*. In addition, prosecutors either knew or should have hewed to their duty to ascertain, the length and breadth of a relationship with both federal and state law enforcement authorities which in fact rendered Nagle nothing less than a professional informant. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995).

5. Withheld information would have enabled the petitioner to show that, far from Nagle's merely "hop[ing] that [the police] would

(Cont'd)

The petitioner's trial, and its subsequent lack of meaningful review in the state courts, was "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972), quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *See also e.g.*, *DuBose v. Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980).

The petitioner has never been accorded even a hearing despite demonstrating that Nagle lied to the jury about his criminal record; that he lied about the actual nature of the consideration extended to him for his testimony in *this* case; and that he lied about the supposedly non-specific nature of the consideration actually rendered to him—consideration

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(Cont'd)
'speak in [his] behalf' with respect to the serious criminal charges he then faced," *Rodwell v. Fair*, 834 F.2d 240, 242, Nagle in fact had an undisclosed, very specific and inordinately favorable deal for leniency, to which prosecutors were parties. *See Ely v. Matesanz*, 983 F. Supp. 42 (D. Mass. 1997). This was quintessentially the "type of evidence [that] can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987).

In addition, notwithstanding court orders to do so, prosecutors never disgorged to the petitioner either probation records, or complete criminal records, or a complete accounting of rewards or inducements to *either* of the two men whose testimony comprised the entirety of the Commonwealth's case. To the contrary, prosecutors defrauded the court by permitting Nagle to lie outright to the jury about his own criminal record. Thus, for example, the jury heard about only twelve expurgated and self-serving versions of *fifty-one* criminal charges against Nagle. The petitioner's jury heard about a lone armed robbery charge against Nagle, and numerous "larcenies" which the jurors were never told had been reduced from armed robberies; they did not hear anything of an additional *twenty-six* armed robbery charges. *See Ouimette v. Moran*, *supra*. *See also e.g.*, *Flemmi v. Gunter*, 410 F. Supp. 1361, 1371 (D. Mass. 1976); *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir. 1982). *See Davis v. Alaska*, 415 U.S. 308, 315-316 (1974); *Alford v. United States*, 282 U.S. 687 (1931).

that at very least included a deal as to the disposition of Suffolk County charges which resulted in a level of leniency shocking to the prosecutor who handled those cases, which could, and, in light of his actual record, should have yielded Nagle multiple life sentences.[6]

Disclosure of Nagle's full record and long history with law enforcement would have apprised the fact-finders of the disingenuousness of this chief witness's protestations that he had no concrete hopes of personal reward in exchange for his testimony against the petitioner, supposedly garnered while the petitioner was awaiting trial based solely upon Holmes' story. *See, e.g.*, *United States v. Leja*, 568 F.2d 493, 498 (6th Cir. 1977). Instead, the withheld information enabled prosecutors fraudulently to present a sole "corroborating" witness as a tyro in the system, with no definite expectation of reward.

This was a case bereft of physical evidence. There was not a lone fingerprint, nor a single fiber to tie the petitioner to the unsolved crime. The petitioner was never pursued as a suspect prior to being named by Holmes when Holmes was in federal custody years after the crime. *Compare, e.g.*, *Gilday v. Callahan*, 59 F.3d 257, 270 (1st Cir. 1995) (overwhelming evidence against petitioner); *Commonwealth v. Hall*, 369 Mass. 715, 727-728, 343 N.E.2d 388 (1976) (abundant evidence apart from witness whom defense had sought to

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6. The jury having been fraudulently misled regarding the accusing witnesses' criminal records and about the reason for Nagle's transfer to a western Massachusetts jail, the truth-seeking process was once again compromised by the failure to expose ***promised*** leniency to a critical witness. *Ely v. Matesanz*, 983 F. Supp. 42 (D. Mass. 1997); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence"); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980).

impeach). There was no disinterested witness who inculpated the petitioner. *Cf. Kyles*, *supra* (reversing for failure to disclose exculpatory evidence even where physical evidence linked petitioner to crime).

There was no physical evidence linking the petitioner to the crimes. There was no claimed eyewitness other than Holmes himself—the same immunized witness whose "testimony blaming someone else could secure his release entirely from criminal responsibility for a murder he had committed; his motivation to lie could not have been greater." *Gilday v. Callahan*, 59 F.3d at 269. Compare, e.g., *Id.* at 269; *Flemmi v. Gunter*, 410 F. Supp. 1361 (D. Mass. 1976).

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUIT COURTS AS TO WHETHER, OR IN WHAT CIRCUMSTANCES, A RULE 60(b)(6) MOTION SHOULD BE DEEMED TO CONSTITUTE A SECOND OR SUBSEQUENT PETITION PRESENTED TO THE COURT AS THAT TERM IS DEFINED AND INTERPRETED UNDER TITLE 28 U.S.C. § 2244, PARTICULARLY WHERE THE FIRST CIRCUIT'S DISPOSITION OF THIS CASE IS IN TENSION WITH THIS COURT'S PREVIOUS DECISIONS CONCERNING THE APPROPRIATE RESOLUTION OF CASES IN WHICH PETITIONERS HAVE ACTED WITH APPROPRIATE DILIGENCE AND BEEN THWARTED BY STATE MISCONDUCT.

The petition should be granted because the First Circuit's decision conflicts with holdings of this Court and of other circuits, and because resolution of the dispute requires a national rule interpreting an essential provision of federal criminal procedure. In addition, the First Circuit's failure to grant relief to the petitioner betrays a tension with

this Court's previous holdings in cases interpreting the AEDPA. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 436-437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435 (2000) (petitioner who exercised due diligence was entitled to evidentiary hearing on claims of juror bias and prosecutorial misconduct; AEDPA's goals of comity, finality, and federalism, are not served by foreclosing federal review where factual bases for claims was not reasonably earlier available to petitioner).

Circuit courts which have addressed the issue of whether a Rule 60(b)(6) motion should be deemed a second or subsequent petition under the AEDPA previously had subscribed to three distinct and conflicting approaches to that issue; in this case "of first impression," the First Circuit has adopted its own case-by-case permutation in between the majority approach and, at the other extreme, the Second Circuit's approach to the issue. *Rodwell v. Pepe*, *supra* at 68.

This case therefore presents a compelling one in which to resolve the existing conflict among the circuit courts. As the First Circuit's decision acknowledges, "[d]espite its narrowness, this question has significant implications for habeas procedure—and the courts of appeals that heretofore have grappled with it have reached divergent conclusions." *Id.* at 69.

As the First Circuit's opinion notes, there are three "principal schools of thought on this controversial subject." *Rodwell v. Pepe*, *supra* at 67. "Some courts have held that Rule 60(b) remains fully velivolant in the habeas context," a "permissive approach . . . [that] seems to elevate form over substance," *Id.* at 67, 70.[7] Others have deemed Rule 60(b)

7. A habeas motion seeks to invalidate a state court judgment of conviction. A motion under Rule 60(b), on the other hand, seeks (Cont'd)

unavailable to habeas petitioners, a "rigid rule . . . [that] seems to sweep too broadly."[8] *Id.* at 67, 70. *See, e.g., Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996); *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996). A "third camp consists of courts that, with slight variations, advocate a course somewhere between these extremes." *Id.*

The First Circuit denied the petitioner relief, holding that his motion, by seeking to prove the constitutional infirmity

(Cont'd)

to vacate the federal court judgment denying relief: "while it is undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction, it does not seek that relief. It seeks only to vacate the federal court judgment dismissing the habeas petition." *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001). The *Rodriguez* court reasoned that allowance of a Rule 60(b) motion would merely reinstate the previously dismissed habeas petition, opening the way for the further proceedings which may be necessary in order to secure justice in a given case, and guarding against the grave constitutional errors inherent in an unjust incarceration. The net effect of a successful Rule 60(b) motion in this view is simply to vacate the federal judgment dismissing the habeas petition, and not to vacate the state conviction, and thus such a motion should not be treated as a second or successive petition pursuant to § 2244(B).

8. The majority of jurisdictions which have directly addressed the issue have treated a Rule 60(b) motion to reconsider the denial of a petition for a writ of habes corpus as a second or successive motion for a writ of habeas corpus. *See, e.g., Harris v. Cotton*, 296 F.3d 578, 579-80 (7th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974 (10th Cir. 1998) (per curiam); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998), and cases cited. *See also e.g., McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (interpreting pre-AEDPA mechanism pursuant to 28 U.S.C. § 1154). This Court granted certiorari in a case raising the issue of the possible application of AEDPA to a Rule 60(b) motion. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted*, __ U.S. __, 122 S. Ct. 1605, 152 L. Ed. 2d 620 (April 22, 2002). Petition for certiorari dismissed as improvidently granted December 10, 2002, No. 01-9094.

of his conviction, "is a paradigmatic habeas claim." *Rodwell v. Pepe*, *supra* at 72. "It is, therefore, subject to AEDPA's restrictions on the filing of second or successive habeas petitions, rather than to the conventional jurisprudence of Rule 60(b)." *Id.* Tautologically, the First Circuit characterized the petitioner's proffer of an ongoing fraud stemming from improperly withheld evidence—including evidence withheld during the original habeas proceeding—as seeking "an end run around the strict limitations that the AEDPA imposes upon the filing of second or successive habeas petitions," and as incompatible with the denial of his application to file a second habeas petition. *Id.*

To determine, as the First Circuit did in this case, that the AEDPA's "harsh" procedural regimen "dovetails with Congress's intent," is unreasonably to elevate one purpose of those restrictions, to the exclusion of other compelling purposes and constitutional considerations: it is true that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation;"[9] but in no sense does the legislative history of the AEDPA support a conclusion that Congress sought finality at the expense of the vindication of petitioners who are blameless in "failing" to have earlier been able to raise their claims.

The First Circuit's approach not only is internally inconsistent,[10] but is at odds with holdings of this Court. The AEDPA "does not equate prisoners who exercise diligence in pursuing their claims with those who do not."

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9. *Rodwell v. Pepe*, *supra*, 324 F.3d at 72, citing H.R. Rep. No. 104-23 (1995), 1995 WL 56412, at *8.

10. The First Circuit purports to recognize that "[m]istake and fraud" are among the examples of circumstances "which might justify setting aside a judgment denying habeas relief although not addressing the underlying criminal conviction." *Rodwell v. Pepe*, *supra*, at 70.

Williams v. Taylor, *supra* at 436, 1490. If, for example, as in this case, a claim "was pursued with diligence but remained undeveloped in state court because . . . the prosecution concealed the facts," a prisoner should not be barred from a hearing on his claim under the statute. *Williams v. Taylor*, 112 F.3d 131, 136 (3d Cir. 1997). The "harsh" construction accorded by the First Circuit to the AEDPA's strictures implies absolutes which simply cannot be found in the pertinent statutory language: "[T]his harsh heading . . . would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court." *Id.*

In no sense were the Congressional interests in finality intended to trump the most fundamental constitutional guarantees: the *Brady* rule "is founded upon the most basic constitutional guarantee . . . the right to due process of law and a fair trial. The government is not entitled to convict a person and send him to prison while it conceals from him material evidence that tends to show he is not guilty." *Watkins v. Miller*, 92 F. Supp. 2d 824, 826 (U.S.D.C., S.D. Indiana 2000).

The First Circuit, conceding a "Faustian bargain between Nagle and the prosecutor," *supra* at 72, "acknowledge[d] that, despite the petitioner's numerous attempts to expose the full extent of the relationship between Nagle and the state prosecutor, no court has exhaustively addressed that claim." *Rodwell v. Pepe*, *supra* at 72. *But See Williams v. Taylor*, *supra*, 529 U.S. at 437, 120 S. Ct. at 1491 ("comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort.").

The petitioner respectfully submits that this Court should determine whether to follow the majority rule which the

District Court judge assumed governed the instant motion, or the contrary position adopted by the Second Circuit, or some version of third-prong approach adopted in this case by the First Circuit. In addition, this Court should determine whether any of those positions is consistent with its own prior interpretations of concomitant provisions of the AEDPA. *See, e.g., Williams v. Taylor, supra.*

In addition, this Court should provide the circuit courts with guidance as to whether the inextricably interrelated misconduct of state and federal authorities, when it involves an aspect of a criminal trial as essential as the nondisclosure of a critical witness's relationship with both state and federal law enforcement authorities, constitutes a variety pf continuing fraud on the district court (which in this case decided the petitioner's original habeas petition), and as such should operate to relieve a petitioner from the AEDPA's barriers—even in the view of many circuits which follow the most restrictive (majority) rule. *See, e.g., Banks v. United States*, 167 F.3d 1082 (7th Cir. 1999) (per curiam) (Rule 60(b) motion not treated as second or successive habeas motion where it challenged integrity of federal habeas proceedings).

Even those jurisdictions which have declined to follow the Second Circuit's approach to Rule 60(b) motions have conceded that the AEDPA does not bar a second or successive petition for habeas corpus based upon fraud upon the district court that initially passed upon the defendant's habeas petition. *See, e.g., Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). Here the petitioner has established, but never been granted a hearing upon, claims that fraud by prosecutorial authorities permeated the proceedings against him, including the reiteration of the state's prosecutorial fraud in the district court proceedings. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

At least one court that follows the majority approach has observed that "Rule 60(b) has a very broad scope and it is easy to imagine cases in which allowing a prisoner to file a motion under it would pose no risk of conflict with the limitations that AEDPA places on successive collateral attacks on state or federal criminal judgments." *Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002). This is such a case: even under the stricter majority approach, the petitioner has made a sufficient showing that his first federal habeas corpus proceeding was dismissed as a result of the same fraudulent representations to the federal court as were advanced by state prosecutors at the state trial level, and thus "AEDPA would not be offended by allowing the district court to entertain the motion" to vacate the judgment of dismissal. *Id.*; *see Banks v. United States*, 167 F.3d 1082, 1083-84 (7th Cir. 1999) (per curiam); *Thompson v. Calderon*, 151 F.3d 918, 921 n.3 (9th Cir. 1998) (en banc).

Further, the petitioner has provided a sufficient showing of "unusual and exceptional circumstances" entitling him to maintain an independent action for relief, under civil habeas principles. *See Barrett v. Secretary of Health & Human Services*, 840 F.2d 1259, 1263 (6th Cir. 1987).

Numerous instances of willful prosecutorial misconduct, which have never garnered the petitioner an appropriate hearing, demonstrate "injustices . . . sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata," and only the allowance of a fair hearing in the safe harbor of federal court will serve to prevent "a grave miscarriage of justice." *See United States v. Beggerly*, 524 U.S. 38, 46-47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). The extrinsic fraud in this case is comprised by that conduct, on the part of both state and federal authorities, which has heretofore prevented the petitioner from presenting his claims in court. *See 2300 Elm Hill Pike, Inc. v. Orlando Residence, Ltd.*, 168 F.3d 490, at p. 2 (6th Cir. 1998 [unpublished]).

The federal court remains the only "safe harbor" where the petitioner may secure fair exploration of crucial claims of fraud by state trial prosecutors, and in turn by federal officials who also had an ongoing, undisclosed relationship favoring the lone witnesses against him. This doctrine "serves as the last line of defense against a fundamentally unjust incarceration." *Mills v. Jordan*, 979 F.2d 1273, 1277-1278 (7th Cir. 1992), *superseded by statute on other grounds*. *See Watkins v. Miller*, *supra* at 834, 843 (issuing writ of habeas corpus where there was systemic prosecutorial failure to comply with discovery requirements, and where sole direct evidence of guilt was alleged jailhouse confession to person with long criminal record and record of cooperation in exchange for official consideration).

At very least, the petitioner should have been granted an evidentiary hearing concerning whether the state's habeas counsel, in the initial habeas proceeding, duplicated the fraud committed by state trial prosecutors who utterly failed to meet their constitutional obligations of disclosure.

The petitioner has never been given an opportunity to appear in any courtroom to present this evidence of systemic, insidious, intentional misconduct, including the use of perjured testimony and the suppression of exculpatory evidence, which deprived him of a fair trial and has resulted in his continuing incarceration. He demonstrated the exceptional circumstances which warrant extraordinary relief under Rule 60(b). *See Davila-Alvarex v. Escuela de Medicina Universidad Central Del Caribe*, 257 F.3d 58, 63 n.8 (1st Cir. 2001); *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999), quoting *Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305, 311 (3d Cir. 1999) (en banc); *First Fidelity Bank, N.A. v. Gov't of Antigua & Barbuda*, 877 F.2d 189, 196 (2d Cir. 1989). *See also Watkins v. Miller*, *supra* at 831.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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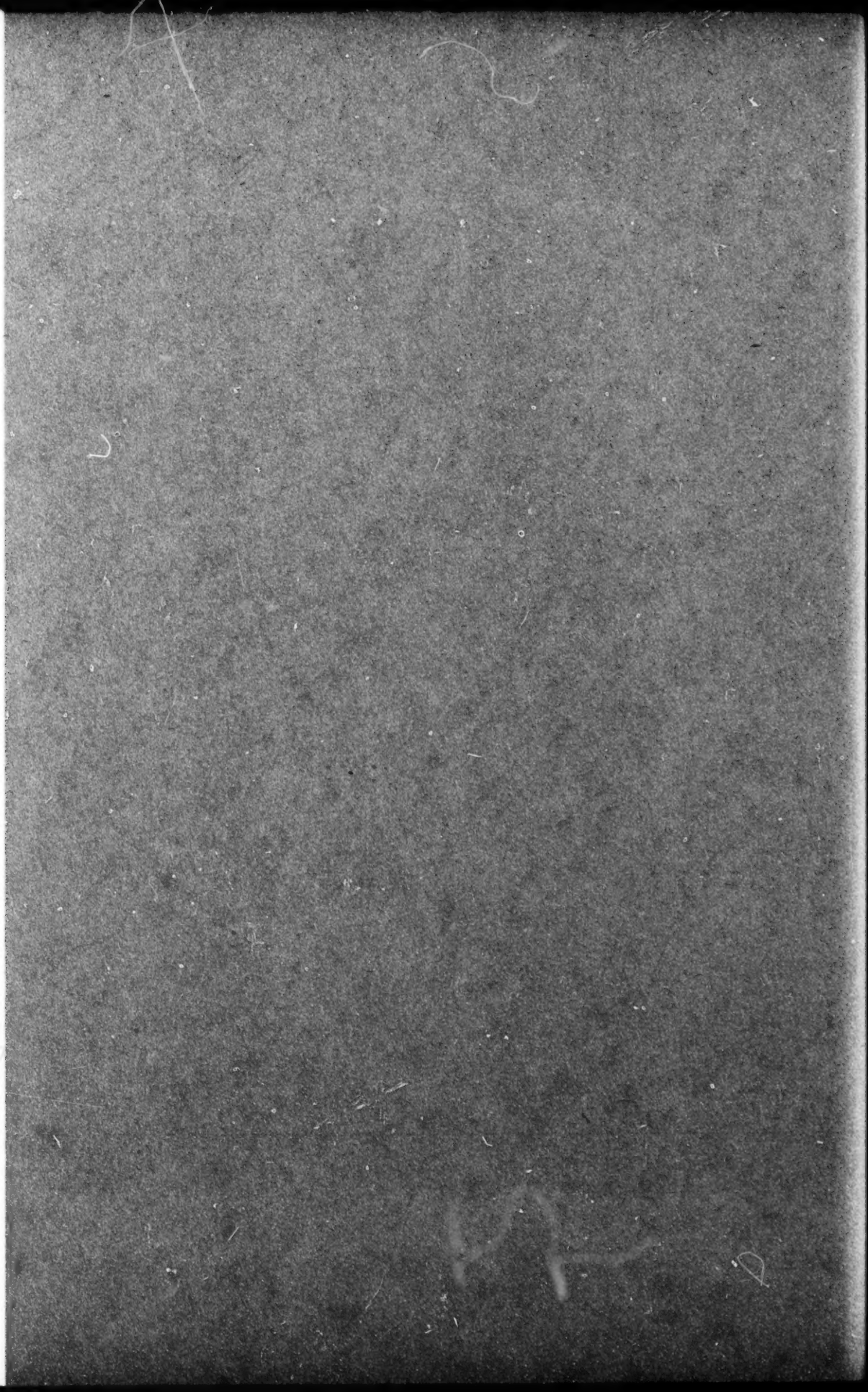

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 1, 2003

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 01-2411

JAMES J. RODWELL,

Petitioner, Appellant,

v.

PETER A. PEPE, JR., ETC.,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Stahl, *Senior Circuit Judge*,
and Lynch, *Circuit Judge*.

April 1, 2003

SELYA, *Circuit Judge.* The case at bar presents a question of first impression in this circuit regarding the circumstances under which a state prisoner may use Rule 60(b) of the Federal Rules of Civil Procedure as a vehicle for resurrecting

a previously dismissed habeas petition. There are three principal schools of thought on this controversial subject. Some courts have held that Rule 60(b) remains fully velivolant in the habeas context. Others have held that the restrictions imposed on the filing of second or successive applications for habeas relief by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (codified as amended in 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000)), make Rule 60(b) unavailable to habeas petitioners. A third camp consists of courts that, with slight variations, advocate a course somewhere between these extremes.

We align ourselves with the third camp. AEDPA's restrictions on the filing of second or successive habeas petitions make it implausible to believe that Congress wanted Rule 60(b) to operate under full throttle in the habeas context. But even though state prisoners seeking habeas relief should not be able to use Rule 60(b) as a means of avoiding AEDPA's carefully calibrated limitations on habeas petitions, we see no justification for throwing out the baby with the bath water. Consequently, we hold that a Rule 60(b) motion should be treated as a second or successive habeas petition if — and only if — the factual predicate set forth in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In other cases — cases in which the factual predicate set forth in support of the motion attacks only the manner in which the earlier habeas judgment has been procured — the motion may be adjudicated under the jurisprudence of Rule 60(b).

In this instance, the petitioner's Rule 60(b) motion is the functional equivalent of a new habeas petition. Because that triggers the AEDPA's requirements for second or successive habeas petitions, we affirm the district court's order of dismissal.

I. TRAVEL OF THE CASE

Since this appeal turns on a question of procedure, the travel of the case comprises the relevant background.

In November of 1981, petitioner-appellant James J. Rodwell stood trial in a Massachusetts state court on a number of charges, including first degree murder, armed robbery, and unlawful carriage of a firearm. One of the key witnesses against him was a fellow inmate, David Nagle, who testified that, while awaiting trial, the petitioner had admitted to the murder and furnished many details. The jury found the petitioner guilty. The court thereafter imposed a mandatory term of life imprisonment on the murder charge and lesser sentences on the other counts.

In 1983, the petitioner filed an unsuccessful motion for a new trial. Two years later, the Massachusetts Supreme Judicial Court (SJC) affirmed both his conviction and the denial of his new trial motion. *See Commonwealth v. Rodwell*, 477 N.E.2d 385 (Mass. 1985). The following year, the petitioner filed another unsuccessful motion for a new trial. This time, the SJC denied his application for further appellate review.

Appendix A

Having exhausted his state remedies, the petitioner sought a writ of habeas corpus in the United States District Court for the District of Massachusetts. He named, as the respondent, a state correctional official.[1] His petition alleged that Nagle was, in effect, an undercover government agent while he and the petitioner were incarcerated together; that Nagle's inquiries about the crime amounted to a post-indictment state interrogation without his lawyer present; that Nagle's testimony should have been excluded as procured in violation of the Sixth Amendment; and that, therefore, his conviction could not pass constitutional muster. The district court denied the petition. *Rodwell v. Fair*, No. 86-2455, slip op. (D. Mass. Apr. 13, 1987) (unpublished). We affirmed the denial, holding that the petitioner had not shown "cause" for failing to present evidence in support of his Sixth Amendment claim in the state court. *Rodwell v. Fair*, 834 F.2d 240, 241-42 (1st Cir. 1987) (per curiam).

The petitioner was not deterred. Following a lull, he filed three more motions for a new trial in the state courts. Each of these was denied, and further appeals in the state system proved fruitless.

At that juncture, the petitioner again eyed a federal forum —- but an obstacle loomed. The AEDPA had taken effect and, under its terms, state prisoners cannot file second or successive federal habeas petitions as a matter of right. *See* 28 U.S.C. § 2244(b)(3). Rather, a state prisoner who

1. The original respondent, Michael Fair, is no longer in office. His successor, Peter A. Pepe, Jr., has been substituted by operation of law. *See* Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(2).

desires to file a second or successive habeas petition must secure pre-clearance from the court of appeals. *See id.* § 2244(b)(3)(A). On October 4, 1999, the petitioner invoked this provision and requested permission to file a second habeas corpus petition.

A panel of this court carefully considered his application and concluded that the petitioner had failed to produce any new facts, sufficient to show his actual innocence clearly and convincingly, which could not have been discovered through the exercise of due diligence at or before the time when he filed his first federal habeas petition. *Rodwell v. Pepe*, No. 99-2109, slip op. at 1 (1st Cir. Nov. 4, 1999) (unpublished). Consequently, the panel refused the petitioner's request to file a second federal habeas petition. *Id.* Under the AEDPA, this decision was final and unappealable. *See* 28 U.S.C. § 2244(b)(3)(E).

Attempting to find a crack in the wall that Congress had erected to guard against the profligate filing of successive applications for post-conviction relief, the petitioner repaired to the district court. On July 6, 2001, he filed a motion to reopen his original federal habeas case. Asserting that the prosecution had suppressed "exculpatory evidence" that shed doubt on Nagle's status and that "it was not until well after his conviction, direct appeal and habeas denial that th[is] significant impeachment information was unearthed," he asked the district court to reverse its earlier denial of habeas relief.

The district court, *Rodwell v. Pepe*, 183 F. Supp. 2d 129, 133 (D. Mass. 2001), reasonably construed the petitioner's

motion as one brought pursuant to Federal Rule of Civil Procedure 60(b)[2] — a characterization that the petitioner enthusiastically embraced. Turning to the question of whether a Rule 60(b) motion seeking vacation of a judgment denying habeas relief should be treated as a second or successive habeas petition for AEDPA purposes, the district court answered that question affirmatively. *Id.* at 133-34. On that basis, the court ruled that it was without jurisdiction to hear the motion. *Id.* at 134-35 (citing 28 U.S.C. § 2244(b)(3)). In a subsequent order, the court, recognizing that the pertinent authorities were in some disarray, granted a certificate of appealability (COA), *see* 28 U.S.C. § 2253(c), thus allowing this appeal to proceed.

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2. The rule states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct by an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, . . . or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Motions under this rule must be made "within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment . . . was entered or taken." *Id.*

II. ANALYSIS

The COA poses a single question: does a motion for relief presented pursuant to Rule 60(b) constitute a second or subsequent petition under the AEDPA? Despite its narrowness, this question has significant implications for habeas procedure — and the courts of appeals that heretofore have grappled with it have reached divergent conclusions.

We begin by addressing the certified question. After answering it, we proceed to apply the answer to the case at bar.

A. *Determining the Rule of Law.*

As said, the decisions elsewhere have yielded three lines of cases. We turn first to the polar extremes.

The Second Circuit has ruled categorically that "a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001). The court reasoned that a Rule 60(b) motion does not seek the relief requested by a habeas petition, but, rather, "seeks only to vacate the federal court judgment dismissing the habeas petition." *Id.* That is "merely a step along the way" to habeas relief. *Id.* at 199. Consequently, affording Rule 60(b) its customary scope does not offend the AEDPA. *Id.*

At the other end of the spectrum, several courts have concluded that a Rule 60(b) motion in a habeas case must

always be treated as a second or successive habeas petition under the AEDPA. *See, e.g., Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). The Eleventh Circuit is the leading proponent of this proposition. In that court's view, according Rule 60(b) its customary scope in habeas cases would allow prisoners to cloak collateral attacks in the raiment of motions for relief from judgment under Rule 60(b) and thereby evade the limitations that Congress so painstakingly crafted in the AEDPA. *See Mobley*, 306 F.3d at 1096; *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996) (per curiam). Based on this rationale, the court concluded that allowing habeas petitioners access to Rule 60(b) would contravene the very congressional intent that motivated passage of the AEDPA. *See Felker*, 101 F.3d at 661 ("Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before the [AEDPA] was enacted, and it is equally true, if not more so, under the new act.").

Neither of these categorical approaches is watertight. On the one hand, the permissive approach taken by the *Rodriguez* court seems to elevate form over substance. In the process, it opens the door for easy subversion of the AEDPA's restrictions (and, thus, frustrates known congressional intent). On the other hand, the rigid rule adopted in cases such as *Mobley* and *Felker* seems to sweep too broadly. That rule makes no allowance for circumstances, arising in the course of a federal habeas proceeding, which might justify setting aside a judgment denying habeas relief although not addressing the underlying criminal conviction.

Mistake and fraud are examples of such a circumstance. Say, for instance, that a federal judge dismisses a habeas petition because the petitioner fails to respond to a show-cause order — and a subsequent Rule 60(b) motion alleges that the show-cause order was never served on the petitioner. Or say, for instance, that the federal court bases an order of dismissal on the representations of a state prosecutor — and a subsequent Rule 60(b) motion alleges that the representations made to the habeas court were knowingly false. In each situation, the motion challenges only the etiology of the habeas judgment itself. Accordingly, it makes sense to consider the motion as a Rule 60(b) motion simpliciter rather than as a second or successive habeas petition.

Given these concerns, we are reluctant to subscribe to a "one size fits all" taxonomy for the handling of Rule 60(b) motions in the habeas context. The inquiry must proceed case by case. The court must examine the factual predicate set forth in support of a particular motion. When the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion, *see, e.g.*, *Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Superline Transp. Co.*, 953 F.2d 17, 19-20 (1st Cir. 1992), and such a motion should be treated within the usual confines of Rule 60(b).

The approach that we favor is pragmatic in nature. Under it, the answer to the question of what law applies will depend not on the label affixed to a particular motion but on its essence. This approach is exemplified by the Seventh Circuit's opinion in *Dunlap v. Litscher*, 301 F.3d 873 (7th Cir. 2002). The *Dunlap* court warned against permitting facile circumvention of the AEDPA's limitations on successive collateral attacks by the simple expedient of characterizing a habeas petition as a motion under Rule 60(b). *Id.* at 875. "Otherwise, the AEDPA's limitations on collateral attack would be set at naught." *Id.* But the court acknowledged that "Rule 60(b) has a very broad scope and it is easy to imagine cases in which allowing a prisoner to file a motion under it would pose no risk of conflict with the limitations that AEDPA places on successive collateral attacks. . . ." *Id.* at 875-76. Thus, the court signaled that it would allow the use of Rule 60(b) in habeas cases as long as a particular motion did not encroach upon "territory occupied by AEDPA." *Id.* at 876.

Other courts also have taken this approach (or variations of it). *See Thompson v. Calderon*, 151 F.3d 918, 921 & n.3 (9th Cir. 1998) (en banc) (acknowledging that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but eschewing "a bright line rule equating all Rule 60(b) motions with successive habeas petitions"); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) (indicating a willingness to consider whether a Rule 60(b) motion "is the functional equivalent of a [habeas petition]"); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (treating a Rule 60(b) motion as a successive habeas petition because the claims raised "were equivalent to additional habeas

claims"); *Guinan v. Delo*, 5 F.3d 313, 316 (8th Cir. 1993) (stating that "a Rule 60(b) motion seeking relief from the denial of a habeas petition [is] properly treated as a second habeas petition," but leaving open "the possibility that a habeas case may present circumstances in which a Rule 60(b) motion might properly be examined as such"); *see also Mobley*, 306 F.3d at 1101 (Tjoflat, J., dissenting) (pointing out that "a second or successive habeas corpus petition . . . is meant to remedy constitutional violations . . . while a Rule 60(b) motion is designed to cure procedural violations"). We join with the overall approach of these courts and hold that a district judge should treat a Rule 60(b) motion in a habeas case as a second or successive habeas petition whenever the motion threatens to encroach upon precincts patrolled by the AEDPA, that is, whenever the factual predicate set forth in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In contrast, if the factual predicate of the motion challenges only the procurement of the federal habeas judgment, it may be adjudicated under Rule 60(b).

We do not pretend that this test will operate with mathematical precision. One can conjure up examples that defy easy placement along the continuum that we envision. But words have their limitations, and no bright-line rule can entirely capture the idea, reflected in our holding, that a Rule 60(b) motion should be considered and adjudicated as a second or successive habeas petition so long as it is the functional and practical equivalent of an application for habeas relief. We are confident that, given this general guidance, the district courts will be able to sift wheat from chaff without undue difficulty.

B. *Applying the Holding.*

We next apply this holding to the petitioner's motion. That motion presents a direct challenge to the constitutionality of his state court conviction. It asks the district court for an opportunity to offer facts that (in the petitioner's view) will prove that his conviction was "constitutionally infirm." Such a claim is a paradigmatic habeas claim. It is, therefore, subject to AEDPA's restrictions on the filing of second or successive habeas petitions, rather than to the conventional jurisprudence of Rule 60(b).

In an effort to alter this conclusion, the petitioner argues that the evidence upon which he now relies was improperly withheld during earlier proceedings (including the original habeas proceeding), thus constituting an "ongoing fraud" that challenges the integrity of the habeas judgment itself. This argument is clever, but flawed. For one thing, it seeks to accomplish an end run around the strict limitations that the AEDPA imposes upon the filing of second or successive habeas petitions. For another thing, it runs afoul of the law of the case doctrine. After all, the petitioner presented essentially the same material to this court in his unsuccessful effort to secure permission to file a second habeas petition. We ruled then that the petitioner was aware of much of the evidence in question at the time of his first habeas petition yet "fail[ed] to develop any argument that the remaining information was both unobtainable and probative." The law of the case doctrine ordinarily calls for us to honor our previous assessment, *see Ellis v. United States*, 313 F.3d 636, 646-47 (1st Cir. 2002), and there is no valid reason to do otherwise here.

To cinch matters, the petitioner concedes that, on the record then before it, the district court committed no error in its handling of the original habeas proceeding such as would undermine the procurement of the judgment entered therein. The most that can be said for his present position is that the district court, if it had the benefit of a more elaborate presentation of the facts concerning the Faustian bargain between Nagle and the prosecutor, would have ruled differently in the habeas case and set aside the underlying conviction. So viewed, the motion before us is the practical equivalent of a second or successive habeas petition.

We add a coda. We acknowledge that, despite the petitioner's numerous attempts to expose the full extent of the relationship between Nagle and the state prosecutor, no court has exhaustively addressed that claim. Some of these lost opportunities may fairly be attributed to procedural errors on the petitioner's part. Others, however, are linked to the stringent filters that channel consideration of habeas corpus claims under the AEDPA. This regimen, though harsh, dovetails with Congress's intent. *See* H.R.Rep. No. 104-23 (1995), 1995 WL 56412, at *8 (explaining that the AEDPA is "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation"). Section 2244(b)(3) establishes a rigorous gatekeeping arrangement through which second or successive habeas applications must pass, and it was the petitioner's inability to open that gate that kept the district court from probing more deeply into the circumstances surrounding Nagle's testimony. This may seem overly restrictive — but any complaint about the inadequacy of the mechanisms available for judicial review in habeas cases ordinarily must

be addressed to the Congress, not to the courts. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (recognizing that "judgments about the proper scope of the [habeas] writ are normally for Congress to make"); *see also United States v. Victoria-Peguero*, 920 F.2d 77, 81 (1st Cir. 1990) (stating this court's resolve to refrain from "substitut[ing] judicial judgment for legislative judgment or . . . plac[ing] limitations on [statutory language] which were not envisioned by Congress").

III. CONCLUSION

We need go no further. We hold that the lower court appropriately treated the petitioner's Rule 60(b) motion as a second or successive habeas petition. Therefore, the court had no choice but to dismiss the motion for lack of subject matter jurisdiction. *See* 28 U.S.C. § 2244(b)(3).

Affirmed.

Appendix A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 01-2411

JAMES J. RODWELL,

Petitioner, Appellant,

v.

PETER A. PEPE, JR., ETC.,

Respondent, Appellee.

JUDGMENT

Entered: April 1, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED AUGUST 9, 2002

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2411

JAMES RODWELL

Petitioner - Appellant

v.

PETER E. PEPE, JR.,

Respondent - Appellee

ORDER OF COURT
Entered: August 9, 2002

The district court granted the request for a Certificate of Appealability. Accordingly, pursuant to Grant-Chase v. Commissioner, 145 F.3d 431 (1st Circuit, 1998), this appeal can go forward.

A briefing schedule is attached to this order.

By the Court:

Richard Cushing Donovan, Clerk

By: JULIE GREGG
Appeals Attorney

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 86-02455-WGY

JAMES J. RODWELL,

Petitioner,

v.

PETER A. PEPE, JR.,

Respondent.

MEMORANDUM AND ORDER

YOUNG, C.J. August 28, 2001

The petitioner, James J. Rodwell ("Rodwell"), has filed a motion with this Court to reopen his petition for writ of habeas corpus, which this Court denied as without merit on April 13, 1987. *Rodwell v. Fair*, No. 86-2455, slip op. at 1 (D. Mass. Apr. 13, 1987), *aff'd*, 834 F.2d 240 (1st Cir. 1987) (per curiam).

Appendix C

I. Background[1]

The victim in this case was shot and killed on December 3, 1978 in Somerville, Massachusetts. Two and a half years later, in the spring of 1981, Francis X. Holmes, Jr. ("Holmes"), while under arrest for another crime, informed police that he had been Rodwell's accomplice in committing the murder. Holmes subsequently testified as an immunized witness at Rodwell's trial, pursuant to Massachusetts General Laws chapter 233, section 20E. *Fair*, slip op. at 1-2; *Commonwealth v. Rodwell*, 394 Mass. 694, 695, 477 N.E.2d 385 (1985).

After Rodwell was arrested, he was held in lieu of bail at the Middlesex County house of correction in Billerica, Massachusetts. While there, Rodwell became acquainted with a fellow prisoner, David Nagle ("Nagle"). At Rodwell's trial, Nagle testified that Rodwell had admitted to him that he had murdered the victim and had described the circumstances of the crime to him.[2] *Fair*, slip op. at 2; 394 Mass. at 695.

The Commonwealth relied primarily on Holmes's and Nagle's testimony in making a case against Rodwell. *Fair*,

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1. The Court relies on the opinion of the Supreme Judicial Court in *Rodwell v. Commonwealth*, 432 Mass. 1016 (2000) (rescript) for this background information. Additional sources are indicated in the text where they are relevant.

2. Under Massachusetts General Laws chapter 233, section 20I, Holmes's testimony required corroboration, and Nagle's testimony was introduced by the prosecution for this purpose. *Fair*, slip op. at 2.

slip op. at 2. Based on this evidence, in 1981, a jury convicted Rodwell of murder in the first degree, armed robbery, and unlawfully carrying a firearm. Rodwell was sentenced to a mandatory term of life imprisonment for the murder conviction, a concurrent sentence of fifteen to twenty years for the armed robbery conviction, and a concurrent sentence of three to five years for the firearm conviction.

In 1983, Rodwell filed his first motion for a new trial, which was denied by the trial judge. Two years later, in 1985, the Supreme Judicial Court affirmed both Rodwell's conviction and the denial of his motion for a new trial. At that time, the Supreme Judicial Court reviewed the entire case pursuant to Massachusetts General Laws chapter 278, section 33E.[3] In 1986, Rodwell filed a second motion for a new trial, which was again denied by the trial judge. Rodwell then filed an application in the county court pursuant to section 33E for leave to appeal to the full Supreme Judicial Court, which was denied.

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3. Section 33E provides that in a case in which the defendant was tried and convicted of murder in the first degree, the Supreme Judicial Court may review the law and the evidence of the whole case. After such review,

> the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence.

Mass. Gen. Laws ch. 278, § 33E.

Appendix C

Having exhausted his state appeals, Rodwell sought a writ of habeas corpus in this Court asserting violations of his Sixth Amendment right to assistance of counsel and the right to be confronted with the witnesses against him. *Fair*, slip op. at 1. "His basic claim [was] that David Nagle, who testified about incriminating statements Rodwell had made when they were imprisoned together, was an undercover government agent[, and that this] amount[ed] to a state interrogation after his indictment and without his lawyer present, which violates the Sixth Amendment." 834 F.2d at 241. On April 13, 1987, this Court concluded that Rodwell had shown neither cause nor prejudice for his failure to raise the issue in accordance with state procedural rules and that, aside from this procedural default, his claims were without merit. The Court denied Rodwell's petition for writ of habeas corpus, *Fair*, slip op. at 2, 3-7, and the First Circuit affirmed, 834 F.2d at 241-42.

Rodwell filed a third motion for a new trial in 1993. After a hearing, a Superior Court justice denied the motion. A single justice of the Supreme Judicial Court denied Rodwell's application to appeal to the full court. In 1997, Rodwell filed a fourth motion for a new trial. After concluding that Rodwell had waived the issues raised in the motion, a Superior Court justice denied it. Rodwell's motion to reconsider was also denied. Rodwell then petitioned the county court for permission to appeal to the full Supreme Judicial Court, but this request was denied.

In 1998, Rodwell filed a fifth post-conviction motion, seeking a new trial pursuant to Massachusetts Rule of Criminal Procedure 30(b) and correction of an illegal

sentence pursuant to Massachusetts Rule of Criminal Procedure 30(a). He raised several issues in his motion, including, for the first time, the illegality of his armed robbery sentence as duplicative. A Superior Court justice concluded that the issues raised had been waived and refused to consider them. Rodwell filed a petition to a single justice to appeal to the full Supreme Judicial Court, and the single justice allowed so much of the petition as concerned Rodwell's waiver of the claim regarding the legality of the armed robbery sentence. On July 28, 2000, the full Supreme Judicial Court dismissed the appeal upon concluding that Rodwell had waived the claim that his sentence for armed robbery was illegal.

II. The Instant Motion

On July 6, 2001, nearly a year after the dismissal of his appeal by the Supreme Judicial Court, Rodwell filed the motion currently before this Court, entitled "Motion to Re-Open Petition for Habeas Corpus." Rodwell asserts that newly discovered evidence reveals that he is actually innocent of the crimes of which he was convicted and that his conviction is constitutionally infirm. Pet'r's Mot. at 1. Specifically, Rodwell argues that: (1) he should have been afforded a hearing to demonstrate that Nagle's testimony ought be precluded as that of a government agent, Pet'r's Mem. at 16-28; (2) the prosecution withheld substantial information about Nagle's potential bias, incentive to implicate Rodwell, and false testimony that would have been exculpatory, *id.* at 28-45; (3) this intentional withholding of potentially exculpatory information by the prosecution denied Rodwell his due process and Sixth Amendment rights to

confront the witnesses against him, *id.* at 45-62; and (4) the jury foreperson's prejudice and the prosecutor's comments on the "type of person" Rodwell was entitled him to a hearing as to whether jury deliberations were infected by prejudicial extraneous considerations, *id.* at 62-64.

III. Analysis

Rodwell has styled the instant motion as a motion to reopen his previous petition for writ of habeas corpus, which this Court denied in 1987. Although Rodwell does not inform the Court of either the procedural vehicle or the legal authority pursuant to which the Court ought consider the motion to reopen, the Court construes Rodwell's motion as one brought pursuant to Federal Rule of Civil Procedure 60(b), which grants to district courts limited authority to reconsider final judgments.[4] This Court can think

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4. Federal Rule of Civil Procedure 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

(Cont'd)

of no other authority pursuant to which it could reopen Rodwell's previous habeas petition subsequent to the entry of a final judgment thereon. *Cf. Berthoff v. United States*, 140 F. Supp. 2d 50, 58 (D. Mass. 2001) (noting that the petitioner had not sought relief from the Court's judgment pursuant to Rule 60(b) and stating that the "Court is without authority to allow an amendment to the pleadings after judgment has been rendered and while the judgment still remains in force"), *appeal filed*, No. 01-1592 (1st Cir. Apr. 20, 2001).

Having construed Rodwell's motion as one pursuant to Rule 60(b)(6), however, this Court is presented with a question that has not previously been addressed in the First Circuit: whether a Rule 60(b)(6) motion, seeking vacatur of a judgment denying habeas relief, is in effect a second or successive habeas petition under 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death

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(Cont'd)

> equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Id.

Rodwell arguably might rely on either section 2 or section 6 of Rule 60(b). Under section 2, however, Rodwell's arguments are untimely. *See id.* (establishing that motions under Rule 60(b) must be made "within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken"). Therefore, Rodwell's remedy, if any, must lie under section 6.

Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (reforming habeas corpus statute).

Nearly every circuit to have considered this issue has concluded that a post-judgment Rule 60(b) motion filed in a habeas proceeding is a second or successive habeas petition. *E.g.*, *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) ("[W]hen the factual predicate for a Rule 60(b) motion also states a claim for a successive petition under 28 U.S.C. § 2244(b) . . . the Rule 60(b) motion should be treated as a successive habeas petition."); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam) (holding that the petitioner's Rule 60(b)(6) motion was a second habeas petition); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) (noting "recent trend . . . to treat motions by federal prisoners to set aside their convictions on constitutional grounds as [habeas] motions, regardless of the label affixed to the motion"), *cert. denied*, 526 U.S. 1011 (1999); *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) ("Appellate courts agree that a post-judgment motion under Fed.R.Civ.P. 60(b) in the district court . . . is a 'second or successive' application for purposes of § 2244(b)."); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996) (per curiam) (holding that district court properly denied petitioner's Rule 60(b) motion for relief from judgment because it should have been treated as a second or successive habeas corpus application); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) ("We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition. . . ."); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) ("[A] district court may properly treat

a Rule 60(b) motion as a successive habeas petition. . . ."); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (holding that the district court did not err by treating the petitioner's "Rule 60(b)(6) motion as the functional equivalent of a second petition for a writ of habeas corpus"); *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990) (evaluating Rule 60(b) motion as habeas petition and dismissing on non-exhaustion grounds). *Contra Rodriguez v. Mitchell*, 252 F.3d 191, 200 (2d Cir. 2001) (asserting that the opinions of these courts "depend largely on conclusory statements and citations to one another," and holding that "better reasons support the conclusion that a Rule 60(b) motion to vacate a judgment denying habeas is not a second petition under § 2244(b)").

This Court is persuaded that the First Circuit would concur with the reasoning of the overwhelming majority of circuit courts to have considered this issue. Where a petitioner calls upon the court to set aside his conviction on constitutional grounds, his motion is properly construed as a habeas motion, regardless of the heading under which that motion is presented. Rodwell has moved to "reopen" his previous petition, presumably under the procedural rubric of Rule 60(b)(6). Nevertheless, because the substance of his claim is a challenge to the constitutionality of his conviction, in light of material exculpatory information that was allegedly withheld from him by the prosecution, Rodwell's motion is the functional equivalent of a second or successive habeas petition. "Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before [AEDPA] was enacted, and it is equally true, if not more so, under the new act." *Felker*, 101 F.3d at 661.

Appendix C

Because Rodwell's motion to reopen his habeas petition properly is construed as a second habeas corpus application, Rodwell must comply with AEDPA's relevant provisions. AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas petitions. To the extent that Rodwell asserts claims that he presented to this Court in his previous habeas petition, these claims must be dismissed. 28 U.S.C. § 2244(b)(1). To the extent that Rodwell asserts claims that were not presented to this Court in his previous petition, Rodwell must seek authorization from the court of appeals before this Court can consider these claims.[5] *Id.* § 2244(b)(3)(A); *Libby v. Magnusson*, 177 F.3d 43, 45 (1st Cir. 1999) ("Under [AEDPA's] paradigm, a second or successive habeas petition is not a matter of right — and the gatekeeping function belongs to the court of appeals, not to the district court.").

It would be futile for this Court to refer Rodwell to the First Circuit to obtain such authorization, however, because Rodwell previously sought, and was denied, leave to file a second petition. *See* Pet'r's Mot. Ex. 1 (Reddington Aff. ¶ 10). A three-judge panel of the First Circuit considered the arguments that Rodwell raises in the instant petition and determined that Rodwell

> fail[ed] to make a *prima facie* showing that his grounds rely on any new factual predicate which

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5. In order to proceed with claims that were not previously presented to this Court, Rodwell would have to make a prima facie showing that the claims are either predicated on newly discovered facts that call into question the accuracy of his guilty verdict, 28 U.S.C. § 2244(b)(2)(B), or rely on a new rule of constitutional law, *id.* § 2244(b)(2)(A). *Id.* § 2244(b)(3)(C).

> could not have been discovered through the exercise of due diligence when he filed his first § 2254 petition and which would show that no reasonable factfinder would have found him guilty of the underlying offense.

Rodwell v. Pepe, No. 99-2109, slip op. at 1 (1st Cir. Nov. 4, 1999) (per curiam) (citing 28 U.S.C. §§ 2244(b)(2)(B) & (b)(3)(C)). The First Circuit further noted that "Rodwell was aware of the existence of much of the information when he filed his first petition. He fails to develop any argument that the remaining information was both unobtainable and probative." *Id.* Rodwell does not suggest in his motion to this Court that his circumstances have changed between the date of the panel decision, November 4, 1999, and the date that the instant petition was filed, July 6, 2001. Thus, further solicitation by Rodwell of the First Circuit for an order authorizing this Court to consider his petition would likely prove fruitless.

In light of Rodwell's failure to obtain prior authorization from the First Circuit to file the instant petition in this Court, this Court lacks jurisdiction to decide Rodwell's unauthorized second petition.[6] *See* 28 U.S.C. § 2244(b)(3)(E) ("The grant

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6. Even if this Court were to reach the merits of Rodwell's motion, however, it would still conclude that Rodwell cannot avail himself of Rule 60(b)(6). Although many courts have indicated that Rule 60(b) motions should be granted liberally, *see Davila-Alvarez v. Escuela de Medicina Universidad Central Del Caribe*, 257 F.3d 58, 63 n. 8 (1st Cir. 2001) (citing cases from Second, Fifth, and Eleventh Circuits), the First Circuit has adopted a stricter approach. "Because Rule 60(b) is a vehicle for extraordinary relief, motions

(Cont'd)

or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable. . . .").

IV. Conclusion

The Court construes Rodwell's motion as one pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate this Court's judgment of April 13, 1987, which denied Rodwell's first petition for writ of habeas corpus. Rodwell's motion under Rule 60(b)(6) is in substance a second habeas petition and thus subject to the gatekeeping standards of AEDPA. 28 U.S.C. § 2244(b)(3). Because the First Circuit has previously declined to authorize this Court to consider Rodwell's habeas petition, *Pepe*, slip op. at 1, Rodwell's "Motion to Re-Open Petition for Habeas Corpus" [Docket No. 1] is DISMISSED for want of subject matter jurisdiction.

s/ William G. Young
WILLIAM G. YOUNG
CHIEF JUDGE

(Cont'd)

invoking the rule should be granted only under exceptional circumstances." *Id.* at 64 (quoting *Torre v. Cont'l Ins. Co.*, 15 F.3d 12, 14-15 (1st Cir. 1994)) (internal quotation marks omitted).

Rodwell has not presented this Court with any evidence that exceptional circumstances are here present such as would warrant granting his motion to reopen. Rodwell's motion merely resurrects claims that this Court considered in his first habeas petition. Although Rodwell alleges that newly discovered facts prove his innocence, he has not demonstrated that these alleged facts could not have been discovered through the exercise of due diligence when he filed his first section 2254 petition. Thus, Rodwell does not appear to have any basis to seek relief pursuant to Rule 60(b)(6).

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED NOVEMBER 4, 1999

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 99-2109

JAMES RODWELL,

Petitioner,

v.

PETER A. PEPE, JR.,

Respondent.

Before

Selya, *Circuit Judge*,
Cyr, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

JUDGMENT

Entered: November 4, 1999

We *deny* Mr. Rodwell's application to file a successive *habeas corpus* petition. He fails to make a *prima facie* showing that his grounds rely on any new factual predicate which could not have been discovered through the exercise of due diligence when he filed his first § 2254 petition and

which would show that no reasonable factfinder would have found him guilty of the underlying offense. 28 U.S.C. §§ 2244 (b) (2) (B) and (b) (3) (C). The record shows that James Rodwell was aware of the existence of much of the information when he filed his first petition. He fails to develop any argument that the remaining information was both unobtainable and probative. Among other considerations, as we previously admonished, the jury had ample evidence with which to judge Nagle's bias, and evidence from Nagel's history of providing information in return for leniency does not establish that he was a government agent. *Rodwell v. Fair*, 834 F.2d 240, 241-242 (1st Cir. 1987) (*per curiam*)

By the Court:

PHOEBE D. MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

APPENDIX E — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED DECEMBER 3, 1987

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 87-1447

James J. RODWELL,

Petitioner, Appellant,

v.

Michael FAIR, etc., et al.,

Respondents, Appellees.

Heard Oct. 8, 1987
Decided Dec. 3, 1987.

Defendant sought writ of habeas corpus in federal district court alleging denial of his Fifth and Sixth Amendment rights. The United States District Court for the District of Massachusetts, William G. Young, J., denied petition, and defendant appealed. The Court of Appeals held that: (1) failure of defendant to show cause why he did not comply with procedural rule in pretrial hearing, precluded argument on same ground during habeas proceeding, and (2) failure of defendant to explain to trial court purpose of his cross-examination of state's witness, precluded defendant from attacking denial of that cross-examination during habeas proceeding.

Affirmed.

Appendix E

Before BREYER, Circuit Judge, BROWN,* Senior Circuit Judge, and SELYA, Circuit Judge.

PER CURIAM.

A Massachusetts state court convicted the appellant James Rodwell of first degree murder. After exhausting his state appeals, he sought a writ of habeas corpus in federal district court, and now appeals from its denial. His basic claim is that David Nagle, who testified about incriminating statements Rodwell had made when they were imprisoned together, was an undercover government agent. This, says Rodwell, amounts to a state interrogation after his indictment and without his lawyer present, which violates the Sixth Amendment. *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

The problem with Rodwell's claim is that the evidence he offered in his pretrial motion to suppress Nagle's testimony and at trial does not bear it out. It does not show that the state put Nagle into jail in order to question Rodwell. It does not demonstrate any "knowing exploitation by the State of an opportunity to confront the accused without counsel['s] being present." *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985).

Rodwell essentially concedes this, but he argues that other evidence he would like to have introduced would have made out a stronger claim. That evidence would have shown

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* Of the Fifth Circuit, sitting by designation.

that Nagle had acted as a police informer in the past, which, Rodwell says, means the state should have known he would likely interrogate Rodwell (without his lawyer).

We need not decide, however, whether these facts could somehow transform Nagle into a government agent (which seems doubtful since "knowing exploitation" suggests that the State must, at least, encourage the informer, *see United States v. Walther*, 652 F.2d 788, 792-93 (9th Cir.1981)), for Rodwell did not properly seek to present this evidence in state court. He should have raised the matter in his pretrial motion to bar Nagle's testimony, and he should have then presented "an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion." Mass.R.Crim.P. 13(a)(2). Rodwell did not present an adequate affidavit; the Massachusetts trial court, for this reason, did not hold an evidentiary hearing about whether to bar Nagle's testimony; the Massachusetts appellate court affirmed that decision for that reason; and that reason constitutes an "adequate state ground" for the judgment. *Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). Rodwell shows no "cause" for failing to comply with the state's procedural rule. Hence, he cannot now argue that his additional evidence would have made a significant difference. *Wainwright, supra* (requiring a showing of "cause" for, and "actual prejudice" from, failing to comply with state procedural rules in order to merit habeas relief).

Rodwell also claims that the State violated his Sixth Amendment right to confront witnesses. Rodwell's counsel

tried to question Nagle about his past activities as an informer, but the judge refused to allow such questioning because he understood that its purpose was to help develop Rodwell's theory that Nagle, by previous acts as an informant, somehow became a state agent for *Massiah* purposes. As to that purpose, the trial judge ruled that Rodwell ought to have raised the matter before trial.

Rodwell counters that he wanted to use the cross-examination to show that Nagle was biased, not that he was a government agent. He adds that in the pretrial hearing the judge said that whether or not Mr. Nagle was cooperating with the authorities on pending cases "might very well be a ground for cross-examination of Mr. Nagle." The record, in context, suggests that the trial court did perceive the possibility of using the information *to show bias* on cross, but Rodwell did not explain that this was his purpose when he sought to cross-examine. What he said to the trial court led it reasonably to believe that his purpose was to pursue his *Massiah* theory. That being so, the Massachusetts courts upheld the trial judge's decision, citing the Massachusetts rule that an attorney must explain to the trial court the reason for his challenged cross-examination when that reason is not apparent. *Commonwealth v. Cheek*, 374 Mass. 613, 615, 373 N.E.2d 1161 (1978). This reason constitutes an adequate state ground, which bars review as Rodwell has shown no "cause" for failing to comply. *Wainwright, supra.*

In any event, the jury heard ample evidence with which to judge Nagle's bias — he testified that, after he spoke with Rodwell, he went to the police in this case in the hope that they would "speak in [his] behalf" with respect to the serious

criminal charges he then faced, *Niziolek v. Ashe*, 694 F.2d 282, 289 (1st Cir.1982), and counsel explored the matter further in cross-examination.

The judgment of the district court is *Affirmed.*